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8 Attorney for Defendant ALFREDO ARCOS-ANTONES

9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA  
11 (HON. JOHN A. HOUSTON)

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 ALFREDO ARCOS-ANTONES,

16 Defendant.  
17  
18

Case No. 08 CR 0292 JAH

STATEMENT OF FACTS AND POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO:  
1) COMPEL DISCOVERY.

19 I.

20 STATEMENT OF FACTS

21 On January 19, 2008, Border Patrol Agents K. Gillan and K. Lopez were notified by the dispatch  
22 center of possible illegal alien activity in the vicinity of Rancho Jamul Drive. When they arrived in the  
23 area, the agents were told by a local resident that a group of suspected illegal aliens were sleeping under  
24 trees in a nearby creek bed. The agents searched the area and discovered 10 people sleeping under a  
25 tree. The agents woke the people and identified themselves as U.S. Border Patrol Agents. All ten  
26 people, including one later identified as the defendant, Alfredo Arcos-Antones, said they were citizens  
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1 and nationals of Mexico and did not have documents allowing them to enter or remain in the United  
 2 States. The ten people, including Mr. Arcos-Antones, were transported to Brown Field Border Patrol  
 3 Station for processing. A record check of Mr. Arcos-Antones revealed Mr. Arcos-Antones has a criminal  
 4 record and had been deported to Mexico on February 24, 2004 through Calexico, California, and had not  
 5 applied for permission from the Attorney General of the United States or his designated successor, the  
 6 Secretary of the Department of Homeland Security, to return to the United States.

## 7 8 II.

### 9 MOTION TO COMPEL DISCOVERY

10 Defense counsel has received some discovery from the government. Mr. Arcos-Antones moves  
 11 for the production by the government of the following items. This request is not limited to those items  
 12 of which the prosecutor knows, but rather includes all discovery listed below that is in the custody,  
 13 control, care, or knowledge of any "closely related investigative [or other] agencies" under **United States**  
 14 **v. Bryan**, 868 F.2d 1032 (9th Cir.), **cert. denied**, 493 U.S. 858 (1989).

15 (1) **The Defendant's Statements** Under Fed. R. Crim. P. 16 (a)(1)(A) the defendant is entitled  
 16 to disclosure of all copies of any written or recorded statements made by the defendant; the substance  
 17 of any statements made by the defendant which the government intends to offer in evidence at trial; any  
 18 recorded testimony of the defendant before the grand jury; any response by the defendant to  
 19 interrogation; the substance of any oral statements which the government intends to introduce at trial,  
 20 and any written summaries of the defendant's oral statements contained in the handwritten notes of the  
 21 government agent; any response to any **Miranda** warnings which may have been given to the defendant  
 22 (see **United States v. McElroy**, 697 F.2d 459 (2d Cir. 1982)); and any other statements by the defendant  
 23 that are discoverable under Fed. R. Crim. P. 16(a)(1)(A). The Advisory Committee Notes as well as the  
 24 1991 amendments to Rule 16 make it clear that the Government must reveal all Mr. Arcos-Antones'  
 25 statements, whether oral or written regardless whether the Government intends to introduce those  
 26 statements. Mr. Arcos-Antones requests the court order the preservation of all rough notes;

1           **(2) Arrest Reports, Notes and Dispatch Tapes** Mr. Arcos-Antones also specifically requests  
 2 all arrest reports, notes and dispatch or any other tapes that relate to the circumstances surrounding his  
 3 arrest or any questioning, if such reports have not already been produced in their entirety, be turned over  
 4 to him. This request includes, but is not limited to, any rough notes, records, reports, transcripts or other  
 5 documents in which statements of the defendant or any other discoverable material is contained. This  
 6 is all discoverable under Fed. R. Crim. P. 16(a)(1)(A) and **Brady v. Maryland**, 373 U.S. 83 (1963). **See**  
 7 **also United States v. Johnson**, 525 F.2d 999 (2d Cir. 1975), **cert. denied**, 424 U.S. 920 (1976); **United**  
 8 **States v. Lewis**, 511 F.2d 798 (D.C. Cir. 1975); **United States v. Pilnick**, 267 F. Supp. 791 (S.D.N.Y.  
 9 1967); **Loux v. United States**, 389 F.2d 911 (9th Cir.), **cert. denied**, 393 U.S. 867 (1968). Arrest  
 10 reports, investigator's notes, memos from arresting officers, dispatch tapes, sworn statements, and  
 11 prosecution reports pertaining to the defendant are available under Fed. R. Crim. P. 16(a)(1)(B) and (C),  
 12 Fed. R. Crim. P. 26.2 and 12(i);

13           **(3) Summaries of Expert Witness Testimony** Pursuant to Fed. R. Crim. P. 16(E), Mr. Arcos-  
 14 Antones requests the summaries of testimony the government intends to use under Rules 702, 703, or  
 15 705 of the Federal Rules of Evidence, including the witnesses' opinions, the bases and the reasons for  
 16 those opinions, and the witnesses' qualifications;

17           **(4) Brady Material** Mr. Arcos-Antones requests all documents, statements, agents' reports, and  
 18 tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of  
 19 the government's case. Impeachment as well as exculpatory evidence falls within **Brady's** definition of  
 20 evidence favorable to the accused. **United States v. Bagley**, 473 U.S. 667 (1985); **United States v.**  
 21 **Agurs**, 427 U.S. 97 (1976). ;

22           **(5) Any Information that May Result in a Lower Sentence under the United States**  
 23 **Sentencing Guidelines** As discussed above, this information is discoverable under Brady v. Maryland,  
 24 373 U.S. 83 (1963). This request includes any cooperation or attempted cooperation by the defendant,  
 25 as well as any information that could affect any base offense level or specific offense characteristic under  
 26 Chapter Two of the Sentencing Guidelines. Also included in this request is any information relevant to  
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1 a Chapter Three adjustment, a determination of the defendant's criminal history, or any other application  
2 of the Sentencing Guidelines;

3 (6) **The Defendant's Prior Record** Evidence of prior record is available under Fed. R. Crim.  
4 P. 16(a)(1)(B);

5 (7) **Any Proposed 404(b) Evidence** Evidence of prior similar acts is discoverable under Fed. R.  
6 Crim. P. 16(a)(1)(C) and Fed. R. Evid. 404(b) and 609. In addition, under Fed. R. Evid. 404(b), "upon  
7 request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the  
8 general nature . . ." of any evidence the government proposes to introduce under Fed. R. Evid. 404(b)  
9 at trial. Mr. Arcos-Antones requests that such notice be given three weeks before trial in order to give  
10 the defense time to adequately investigate and prepare for trial;

11 (8) **Evidence Seized** Evidence seized as a result of any search, either warrantless or with a  
12 warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)(C);

13 (9) **Request for Preservation of Evidence** Mr. Arcos-Antones specifically requests all physical  
14 evidence that may be destroyed, lost, or otherwise removed from the possession, custody, or care of the  
15 government and which relate to the arrest or the events leading to the arrest in this case be preserved.  
16 It is requested that the government be ordered to question all the agencies and individuals involved in the  
17 prosecution and investigation of this case to determine if such evidence exists, and if it does exist, to  
18 inform those parties to preserve any such evidence;

19 (10) **Document and Tangible Objects** Mr. Arcos-Antones requests, under Fed. R. Crim. P.  
20 16(a)(2)(C), the opportunity to inspect and copy as well as test, if necessary, all other documents and  
21 tangible objects, including photographs, books, papers, documents, photographs, of building or places  
22 or copies of portions thereof which are material to the defense or intended for use in the government's  
23 case-in-chief, or were obtained from or belong to the defendant. Specifically, Mr. Acevedo requests the  
24 government provide him with a copy of his "A" file and copies of the tape recordings of all of his court  
25 appearances during the proceedings which led to his alleged deportation.

26 (11) **Evidence of Bias or Motive to Lie** Mr. Arcos-Antones requests any evidence that any  
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1 prospective government witness is biased or prejudiced against the defendant, or has a motive to falsify  
 2 or distort his or her testimony. **Pennsylvania v. Ritchie**, 480 U.S. 39 (1987); **United States v. Strifler**,  
 3 851 F.2d 1197 (9th Cir. 1988), **cert. denied**, 489 U.S. 1032 (1989);

4 (12) **Impeachment Evidence** Mr. Arcos-Antones requests any evidence that any prospective  
 5 government witness has engaged in any criminal act, whether or not resulting in a conviction, and  
 6 whether any witness has made a statement favorable to the defendant. See Fed. R. Evid. 608, 609 and  
 7 613. Such evidence is discoverable under **Brady v. Maryland**, 373 U.S. 83 (1963). See **United States**  
 8 **v. Strifler**, 851 F.2d 1197 (9th Cir. 1988) (witness' prior record); **Thomas v. United States**, 343 F.2d  
 9 49 (9th Cir. 1965) (evidence that detracts from a witness' credibility);

10 (13) **Evidence of Criminal Investigation of Any Government Witness** Mr. Arcos-Antones  
 11 requests any evidence that any prospective witness is under investigation by federal, state or local  
 12 authorities for any criminal conduct. **United States v. Chitty**, 760 F.2d 425 (2d Cir.), cert. denied, 474  
 13 U.S. 945 (1985);

14 (14) **Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling**  
 15 The defense requests any evidence, including any medical or psychiatric report or evaluation, tending to  
 16 show that any prospective witness' ability to perceive, remember, communicate, or tell the truth is  
 17 impaired; and any evidence that a witness has ever used narcotics or other controlled substance, or has  
 18 ever been an alcoholic. **United States v. Strifler**, 851 F.2d 1197 (9th Cir. 1988); **Chavis v. North**  
 19 **Carolina**, 637 F.2d 213, 224 (4th Cir. 1980);

20 (15) **Witness Addresses** Mr. Arcos-Antones requests the name and last known address of each  
 21 prospective government witness. See **United States v. Napue**, 834 F.2d 1311 (7th Cir. 1987); **United**  
 22 **States v. Tucker**, 716 F.2d 576 (9th Cir. 1983) (failure to interview government witnesses by counsel  
 23 is ineffective); **United States v. Cook**, 608 F.2d 1175, 1181 (9th Cir. 1979) (defense has equal right to  
 24 talk to witnesses), **cert. denied**, 444 U.S. 1034 (1980). Mr. Arcos-Antones also requests the name and  
 25 last known address of every witness to the crime or crimes charged (or any of the overt acts committed  
 26 in furtherance thereof) who will not be called as a government witness. **United States v. Cadet**, 727

1 F.2d 1453 (9th Cir. 1984);

2 (16) **Name of Witnesses Favorable to Mr. Arcos-Antones:** Mr. Arcos-Antones requests the  
3 name of any witness who made an arguably favorable statement concerning the defendant or who could  
4 not identify him or who was unsure of his identity, or participation in the crime charged. **Jackson v.**  
5 **Wainwright**, 390 F.2d 288 (5th Cir. 1968); **Chavis v. North Carolina**, 637 F.2d 213, 223 (4th Cir.  
6 1980); **Jones v. Jago**, 575 F.2d 1164, 1168 (6th Cir.), **cert. denied**, 439 U.S. 883 (1978); **Hudson v.**  
7 **Blackburn**, 601 F.2d 785 (5th Cir. 1979), **cert. denied**, 444 U.S. 1086 (1980);

8 (17) **Statements Relevant to the Defense** Mr. Arcos-Antones requests disclosure of any  
9 statement that may be "relevant to any possible defense or contention" that he might assert. **United**  
10 **States v. Bailleaux**, 685 F.2d 1105 (9th Cir. 1982);

11 (18) **Jencks Act Material** Mr. Arcos-Antones requests all material to which defendant is entitled  
12 pursuant to the Jencks Act, 18 U.S.C. § 3500, reasonably in advance of trial, including dispatch tapes.  
13 A verbal acknowledgement that "rough" notes constitute an accurate account of the witness' interview  
14 is sufficient for the report or notes to qualify as a statement under §3500(e)(1). **Campbell v. United**  
15 **States**, 373 U.S. 487, 490-92 (1963). In **United States v. Boshell**, 952 F.2d 1101 (9th Cir. 1991), the  
16 Ninth Circuit held that when an agent goes over interview notes with the subject of the interview the  
17 notes are then subject to the Jencks Act. Mr. Arcos-Antones requests pre-trial production of Jencks  
18 material to expedite cross-examination and to avoid lengthy recesses during trial;

19 (19) **Giglio Information** Pursuant to **Giglio v. United States**, 405 U.S. 150 (1972), Mr. Arcos-  
20 Antones requests all statements and/or promises, express or implied, made to any government witnesses,  
21 in exchange for their testimony in this case, and all other information which could arguably be used for  
22 the impeachment of any government witnesses;

23 (20) **Personnel Records of Government Officers Involved in the Arrest** Mr. Arcos-Antones  
24 requests all citizen complaints and other related internal affairs documents involving any of the  
25 immigration officers or other law enforcement officers who were involved in the investigation, arrest and  
26 interrogation of him, pursuant to **Pitchess v. Superior Court**, 11 Cal. 3d 531, 539 (1974). Because of  
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1 the sensitive nature of these documents, defense counsel will not be able to procure them from any other  
2 source;

3 (21) **Government Examination of Law Enforcement Personnel Files** Mr. Arcos-Antones  
4 requests the government examine the personnel files and any other files within its custody, care or  
5 control, or which could be obtained by the government, for all testifying witnesses, including testifying  
6 officers. Mr. Arcos-Antones requests these files be reviewed by the government attorney for evidence  
7 of perjurious conduct or other like dishonesty, or any other material relevant to impeachment, or any  
8 information that is exculpatory, pursuant to its duty under **United States v. Henthorn**, 931 F.2d 29 (9th  
9 Cir. 1991). The obligation to examine files arises by virtue of the defense making a demand for their  
10 review: the Ninth Circuit in **Henthorn** remanded for **in camera** review of the agents' files because the  
11 government failed to examine the files of agents who testified at trial. This Court should therefore order  
12 the government to review all such files for all testifying witnesses and turn over any material relevant to  
13 impeachment or that is exculpatory to Mr. Arcos-Antones prior to trial. Mr. Arcos-Antones specifically  
14 requests that the prosecutor, not the law enforcement officers, review the files in this case. The duty to  
15 review the files, under **Henthorn**, should be the prosecutor's and not the officers'. Only the prosecutor  
16 has the legal knowledge and ethical obligations to fully comply with this request.

### 17 18 III.

### 19 CONCLUSION

20 Based upon the foregoing, Mr. Alfredo Arcos-Antones respectfully requests the court grant the  
21 above motion.

22  
23 Respectfully submitted,

24  
25 Date: March 6, 2008

26 s/Kathryn A. Thickstun  
27 KATHRYN A. THICKSTUN  
28 Attorney for Defendant ALFREDO ARCOS-ANTONES